IN THE

SUPREME COURT

OF THE UNITED STATES.

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PACIFIC MAIL S. S. COMPANY
vs.
UNITED STATES. } No. 201.

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APPEAL FROM THE COURT OF CLAIMS.

Brief of P. Phillips, for Appellant.

On the 5th October, 1875, the appellant filed its petition in the Court of Claims to recover the amount due under contract with the Post Office Department, executed on 23 August, 1873, under the act of 1 June, 1872, for the transportation of the mails between San Francisco and Hong Kong in China, touching at Yokohoma in Japan.

It claims that there is due to the company, under said contract, seven quarterly payments, accruing between 1 October, 1873, and the close of the quarter ending 30 June, 1875, at the rate of $500,000 per annum—$875,000—less such pro rata deductions on account of omitted voyages, and such fines and penalties as may be found to be due in

accordance with the contract. The number of omitted voyages for which deduction should be made, as the company estimates and believes, is eight, which, at $41,666.66 per voyage, amount to $333,333.33. Evidence of the performance of the round voyages embraced in the payments above claimed, and of the compliance by the company with all the provisions of the contract, was duly furnished to, and is now in the possession of the Post Office Department; and the Post-Master General has been requested to approve and cause to be audited the amount due the company for service between the aforesaid dates, in accordance with the said contract, which he declines and refuses to do.

Wherefore the company prays that a judgment may be rendered in its favor for $541,666.66.

To secure the benefit of certain treaties with China, Congress, on the 17 February, 1865, passed the act entitled "An act to authorize the establishment of an ocean mail steamship service between the United States and China."

13 Stats., 430.

It enacted "that the Post-Master General be, and he is hereby authorized to invite proposals, &c., for mail steamship service between the port of San Francisco in the United States, and some port or ports in the Chinese Empire, touching at Honolulu in the Sandwich Islands, and one or more ports in Japan, by means of a monthly line of first-class American sea-going steamships, to be of not less than 3,000 tons burden, and of sufficient number to perform twelve round trips per annum between said ports; and to contract with the lowest responsible bidder for said service, for a term of not more than ten years, to commence from the day the first steamship of the proposed line shall depart from the port of San Francisco with the mails for

China; *provided*, that no bid shall be considered which shall amount to more than five hundred thousand dollars for the twelve round trips per annum, nor unless the same is from a citizen or citizens of the United States," etc.

"SEC. 2. That any contract which the Postmaster-General may execute under the authority of this act shall go into effect on or before the first day of January, one thousand eight hundred and sixty-seven, and shall, in addition to the usual stipulations of ocean mail steamship contracts, provide that the steamships accepted for the service shall be constructed of the best material, and after approved models, with all the modern improvements adapted to sea-going steamships of the first-class, and shall be subject to inspection and survey by an experienced naval constructor, to be detailed for that purpose by the Secretary of the Navy, whose report shall be made to the Postmaster-General," etc.

Under this act, a contract was entered into with appellant on 16 October, 1866,—exhibited in the Record, p. 8.

In the Act of Congress, entitled "An act making appropriations for the service of the Post Office Department, etc.," approved February 18, 1867, is the following provision: * * * "For the mail steamship service between San Francisco, Japan and China, five hundred thousand dollars; *provided*, that so much of the Act of Congress approved February 17, 1865, authorizing said service, as requires the said steamship to touch at Honolulu, in the Sandwich Islands, shall be and the same is hereby repealed, upon the express condition, however, that the contractors for said steamship service shall enter into contract to the satisfaction of the Postmaster-General, agreeing to establish within five months from the passage of this act, in lieu of the said service released, a branch line of steamship service, con-

veying the United States mail, between the port in Japan used by the mail line of steamships, and the port of Shanghai, in China, making continuous regular trips, connecting with the main line, both on the outward and homeward voyages, under the direction of the Postmaster-General; which service shall be performed by first-class American sea-going steamships, and without additional charge to the United States."

14 Stat., 394.

On 20 March, 1867, the Company executed another contract, in conformity to the provisions of this act, the service to be performed "in first-class American sea-going ships."

By the 11th finding of the court below it is shown that under these statutes, and the agreements of the parties, "seven steamships were, from time to time, inspected and accepted for the service, according to the terms of the contract; the names of which were *Colorada*, *Great Republic*, *China*, *Japan*, *America*, *Alaska*, *and Constitution*. And it was further found that these were more than necessary for the performance of said service." (p. 11.)

While the monthly service was being performed under the above recited acts and contracts, Congress, desirous of doubling the service, passed the act entitled "An act making appropriations for the service of the Post Office Department, for the year ending the 30 June, 1873."

This act was approved 1 June, 1872, and contains the following sections having relation to the matter in hand:

"SEC. 3. The following sums, or so much thereof as may be necessary, be and the same are hereby appropriated for the year ending 30 June, 1873, out of any money in the Treasury not otherwise appropriated, namely:

"For steamship service between San Francisco, Japan and China, $500,000; and the Postmaster-General is hereby authorized to contract with the lowest bidder, within three months after the passage of this act, after 60 days public notice, for a term of ten years, from and after the 1st October, 1873, for the conveyance of an additional monthly mail, on the said route, at a compensation not to exceed the rate per voyage now paid, under the existing contracts, and upon the same conditions and limitations as prescribed by existing Acts of Congress in reference thereto, and the respective contracts made in pursuance thereof; and the contractors, under the provisions of this section, shall be required to carry the United States mails during the existence of their contracts, without additional charge, on all the steamers they may run upon said line, or any part of it, or any branch or extension thereof: *Provided*, That all steamships hereafter accepted for said service shall be of not less than four thousand tons register each, and shall be built of iron, and, with their engines and machinery, shall be wholly of American construction; and shall be so constructed as to be readily adapted to the armed naval service of the United States, in case of war, and, before acceptance, the officers by whom they are inspected shall report to the Secretary of the Navy and the Postmaster-General whether this condition has been complied with. * * * And the Government of the United States shall have the right, in case of war, to take for the use of the United States any of the steamers of said line—and, in such case, pay a reasonable compensation therefor: *Provided*, The price paid shall in no case exceed the original cost of the vessel so taken; and the provision shall extend to and be applicable to the steamers of the Brazilian line hereinafter provided for."

"SEC. 6. That if the contract for the increase of the mail service between San Francisco and China and Japan to a

semi-monthly service shall be made with the Pacific Mail Steamship Company, or shall be performed in said company's ships, or the ships of its successors in interest, the moneys payable under such contracts shall be paid while the said company, or its successors in interest, shall maintain and run the line of steamships for the transportation of freight and passengers, at present run between New York and San Francisco, *via* the Isthmus of Panama, by the said Pacific Mail Steamship Company, and no longer: *Provided*, That said requirements shall in all respects apply to any party contracting for the mail-service between San Francisco and China and Japan, as well as to the Pacific Mail Steamship Company.

17 Stat. at large, 201–2.

The Postmaster-General, on the 5 June, 1872, issued his advertisement, in which the third and sixth sections are cited. (p. 11.)

On 10 August the claimant, as shown by the 5th finding, made its proposal in answer thereto. (p. 13.)

In this, after agreeing that the same should be performed in accordance with the provisions of the third and sixth sections, it is said: "We are now building two iron propellers of about 4500 tons register, capable of steaming 12 knots, and propose, as soon as practicable, with the limited facilities now available in America, to build two more steamers of like construction, but larger and of higher speed; all of which we shall offer for the service in question. Until they can be put into commission, and afterwards, whenever circumstances may require us to relieve them temporarily, we propose to perform the service with one of the steamships heretofore accepted for the China mail service, viz: *America*, *Japan*, *China*, *Great Republic*, *Alaska*, *Colorado*, or in case of need, with the *Constitution*, heretofore accepted as a spare steamer for said service." (p. 14.)

The 6th finding is that this proposal of the company was accepted by the Postmaster-General and the contract annexed to the claimant's petition of 23 August executed.

By the terms of this contract, p. 4, the company agreed to perform the stipulated service "in first-class American steamships, to conform, in all respects, to the requirements and provisions of the 3d section of the Act June 1, 1872—and the advertisement of the Postmaster General; and of sufficient number to perform the required additional monthly service, for and during the term of ten years, commencing 1st October, 1873; and the said contractors do further covenant and agree with the United States, and do bind themselves, that the steamships hereafter offered for the service shall be of not less than 4,000 tons register, and shall be built of iron, &c; and shall be so constructed as to be readily adapted to the armed naval service of the United States, in case of war; and, before acceptance, the officers by whom they are inspected shall report to the Secretary of the Navy and the Postmaster-General whether this condition has been complied with, &c.; and the said contractors do further covenant and agree to carry the United States mails during the existence of their contracts, without additional charge, on all the steamers they may run on said line, or any part of it, or any branch or extension thereof."

On the part of the Government it is stipulated that "for these services, when performed, the said Pacific Mail Steamship Company are to be paid by the United States the sum of five hundred thousand dollars per annum (being at the rate of forty-one thousand six hundred and sixty-six dollars for each round voyage) in the currency of the United States, in quarterly payments, on the receipt at the Post Office Department of satisfactory evidence of the performance of the round voyages embraced in said payments, provided that the moneys payable under this contract shall be

paid while the said Pacific Mail Steamship Company, or its successors in interest, shall maintain and run the line of steamships for the transportation of freight and passengers at present run between New York and San Francisco, via the Isthmus of Panama, by the said Pacific Mail Steamship Company, and no longer, said payments, however, to be subject to deductions, fines, and penalties imposed by the Postmaster General for failures and irregularities, as hereinafter stipulated. It is hereby also stipulated and agreed, by the said contractors and their sureties, that in case of failure, from any cause, to perform any of the regular monthly voyages stipulated for in this contract, a *pro rata* reduction shall be made from the compensation on account of such omitted voyage or voyages. And it is further stipulated and agreed that suitable fines and penalties shall be imposed, in the discretion of the Postmaster General, for delays and irregularities in the performance of the service. If delays occur in the arrivals of the steamers according to schedule, the company will be fined in a sum not exceeding two thousand dollars for every forty-eight hours; and should delays occur in their departure, a fine will be imposed not exceeding one thousand dollars for every twenty-four hours, except in cases of unforeseen and uncontrollable events." * * *

The 7th finding exhibits a correspondence between the Department and the appellant. (p. 14.)

On the 24 October, 1873, the Postmaster General requires of the company a statement in writing of the reasons which have prevented it from commencing the performance of the additional mail service authorized by sections 3 and 6 of the act 1 June, 1872, which service should have been commenced on the 1st October instant."

In this letter it is said: "You will also please what preparations you are making. * * *

"At your recent interview with the Postmaster General you explained to him verbally the causes which prevented your company from commencing this additional mail service to Japan and China on the 1st inst., as required by the law and contract, and also stated that the company was making every effort possible to comply with the requirements of the law at the earliest practicable date, but there is nothing on the files of the department on the subject."

The company replied Nov. 1, stating that, immediately after the passage of the Act of 1872, they had contracted for two iron steamers of upwards of 4,000 tons register, to be completed in time to commence the service. The obstacles that prevented this are then set forth at large

The company then called the attention of the Department to the fact that it was then "performing the semi-monthly service with the mail-steamers now accepted as such by the Department, under the first China contract—and that it proposed placing on the route, in addition, the the new iron ship, *Colima*, and the new iron ship, *Granada;* and with these and the mail-steamers now accepted, it proposed to perform the semi-monthly service until the ships referred to shall take the place of the wooden mail-steamers now on the line." p. 15.

This statement, as to the performance of the service, is sustained by the 9th finding of the Court, as follows:

"After the 1st October, 1873, the claimants continued to dispatch steamers from San Francisco to Japan and China, on or about the middle of each month—in part, those which had been accepted by the Post-Office Department for service, under the contract of 17 February, 1865, and in part, those which had not been so accepted; and the steamers hereinafter in this finding named left San Francisco on the day named, in connection with each, and performed a round voyage out to Japan and China and back to San Francisco, as follows:

China	October	17,	1873
Japan	November	17,	1873
Colorado	February	14,	1874
Alaska	April	18,	1874
Granada	May	16,	1874
Japan	June	12,	1874
Colima	July	14,	1874
Japan	August	29,	1874
Vancouver	September	19,	1874
Vasco de Gama	October	19,	1874
Vancouver	December	12,	1874
Vasco de Gama	January	16,	1875

Of these steamers, the *Granada*, *Colima*, *Vancouver* and *Vasco de Gama* had never been accepted by the Government for the service in the transportation of mails." p. 18.

On the 8th August, 1874, the Department, by letter, informed the Company that the new iron ships, *City of Pekin* and *City of Tokio*, tendered on the 8th July, under the contract of 1873, were accepted for the additional monthly service between San Francisco, Japan and China, to take effect on their arrival at San Francisco; "with the distinct understanding that, as no appropriation was made by Congress, at its last session, for the additional monthly service, no payment can be made therefor, under the contract with your company, until Congress shall have further legislated upon the subject." p. 17.

The tenth finding of the Court is, that "on the 20th February, 1875, the said steamship, *City of Pekin*, left San Francisco, on her first voyage to Japan and China, arrived at Yokohoma on 13th March; Hong Kong on the 25th March; and, on her return, arrived at Yokohoma on 7th April, and at San Francisco on 28th April, 1875; and that on the said voyage, out and back, she carried the United States mail under the contract sued on." p. 18.

On the facts thus found, the Court, on the 11th June, 1878, rendered judgment for the voyage made by the *City of Pekin* in the sum of $41,666.66.

From this judgment both parties have appealed.

Whether the Court of Claims was right in limiting the recovery to the voyage made by the *Pekin* depends upon the construction to be given to the act of June, 1872, and the contract made thereunder.

The great object had in view by Congress in passing the acts of 1865 and 1872 was the transportation of the mails of the United States.

The power to pass them is to be found in the Constitutional authority to "establish post-offices and post-roads."

Under the first act, a contract was made with the claimant for a monthly service, at $500,000 per annum, to continue for ten years.

This contract was in full and successful operation when Congress, realizing the benefits derived therefrom, determined to double this service.

The act of 1872 carries this determination into effect, and in doubling the service, it also doubles the compensation.

Under the first act, the mails were carried by wooden steamers of 3,000 tons burden.

As this was being satisfactorily done, there was no reason, so far as the mails were concerned, why, in increasing the service, vessels of an increased tonnage and of a different quality should be required.

In executing its power Congress, however, thought proper in 1872 to secure the additional advantage of having steamers built of such material and of such tonnage as to fit them for war purposes in case of need.

This act, therefore, after providing that the contract to be made thereunder should be on "*the same conditions and limitations as prescribed by existing acts of Congress and the respective contracts made in pursuance thereof*," proceeds as follows:

"*Provided*, That all steamers *hereafter* accepted for said service shall not be of less than 4,000 tons register, and shall be built of iron," &c., "and shall be so constructed as to be readily adapted to the armed naval service of the United States in case of war," &c.

What was the intention of Congress? Did it mean that while content that the monthly mails should be carried in the vessels then engaged, that the semi-monthly service should not go into operation until vessels such as are described in the proviso could be procured?

As Congress directed steamers to be built fitted for war purposes, the contractor was bound in good faith to use all reasonable means to accomplish this end as speedily as possible. If this was not done, it would have been good ground for a cancellation of the contract. But we repeat that it was never intended to prevent the carrying of the semi-monthly mails until such steamers could be got ready.

Again, it was evidently in the mind of Congress that as this company was then provided with the means of carrying the mails, it would become the contractor for the increased service.

This is to be seen in the use of the words "*hereafter accepted* for said service," used in apposition to those *already accepted*. The only steamers then accepted were those belonging to the company.

But the 6th section is still more to the point, for it pro-

vides "that if the contract (for the new service) shall be made with the Pacific Mail Steamship Company, OR *shall be performed in said company's ships*, the moneys payable under such contracts shall be paid while the said company or its successor shall maintain and run the line of steamships at present run between New York and San Francisco, *via* the Isthmus of Panama."

What was the construction of the contract by the Department at the time it was entered into?

As already stated, the proposal of the company, which the sixth finding states was "accepted by the Postmaster-General and the *written contract entered into in pursuance of said proposal* and acceptance," informs the department that the company was *then building* two iron propellers of 4,500 tons register, and that as soon as practicable will build two more, all of which will be offered for the service in question.

It is then stated, "until they can be put into commission, and afterwards, whenever circumstances may require us to relieve them temporarily, *we propose to perform the service with one of the steamships heretofore accepted for the China mail service*," *&c., &c.* p. 14.

Again, in the correspondence heretofore referred to, in which the department, under date of 24 October, 1873, requests a written statement of the reasons which had been previously verbally given for not commencing the service under sections 3 and 6 of the act of 1872 on the 1 October, the company, after stating the reasons, calls the attention of the department to the semi-monthly service, with its mail steamers, accepted under the first China mail contract; and that it proposed placing on the route the two new iron ships—the Grenada and Colena—until the new ships referred to shall take the place of the wooden mail steamers now on the line." p. 16.

Did the department either before entering into the agreement of August or in reply to the answer made as to the cause of delay indicate the opinion that, by the terms of the statute, none but vessels fitted for war purposes, under the provision of the 3d statute, could be accepted for the semi-monthly service?

On the contrary, it delivered the mails for the semi-monthly service, to the steamers engaged in carrying the monthly mails; and the ninth finding shows they were so carried commencing from 17 October, 1873, and continued to 16 January, 1875.

We submit that the primary object of Congress—to wit, the carrying of the semi-monthly mails—was fully gratified by the service in the same steamers which successfully carried the monthly mails.

It is also shown that the large steamers fitted for war purposes were constructed in good faith and without unreasonable delay. Thus the war purposes of the act were fully accomplished, the mails have been carried, and the required steamers built. No loss has accrued to the Government.

On the 8th August, 1874, the company was notified by the Department that their steamships City of Pekin and City of Tokio, tendered on 8th July, had been inspected and found to be of the required tonnage, and so constructed "as to be readily adapted to the armed naval service of the United States, in case of war."

"The said steamships are, therefore, accepted for the additional monthly mail service authorized by the act 1st June, 1872, to take effect on their arrival at the port of San Francisco to commence said service." p. 17.

On 20th February, 1875, the City of Pekin left San Francisco on her first voyage, carrying the mail, and returned to San Francisco on 25th April. (10th finding.)

The construction we have given to the act of 1872 is the one entertained by the Department of Justice, as will be seen in the opinion given to the Postmaster General.

In this it is said: "It seems plain that the act of 1872 did not require such additional mail service to be done in steamships of the new class unless such became necessary. The act refers to the existing mail contract between the places named," and then speaks of steamships "hereafter accepted for the additional service, and requires them to conform to a certain description."

This was the opinion given by the Solicitor General. The Attorney General also gave his, in which he said: "Looking to the object of the act of 1872, * * * and taking into consideration the fact that such additional mail service has been rendered, *as provided for in said act*, I am of the opinion that it was not an essential part of the contract, that the new iron steamships should be furnished by the 1st October, '73, if at the time it satisfactorily appeared they would be furnished in a reasonable time."

Opinions Att'y Gen'l., 14 vol., 674.

It is urged that, though this may be admitted to be the true construction of the act, yet the contract which was made under its authority contains a stipulation not to be found in the act itself, and which justifies the conclusion that the additional mail service could only be performed by the steamers described in the proviso.

In reading the contract, no presumption is to be indulged in that the Department intended any departure from the

design of the statute. On the contrary, the presumption is that the contract only carries out its provisions.

The substantial contract is: "That this contract shall in all its parts be subject to, and in all respects governed by, the requirements and provisions of the 3d and 6th sections of the act of 1st June, 1872."

The true meaning and sense of the parties is to be collected *ex antecedentibus et consequentibus*.

Applying this rule, we submit that the contract was intended to stipulate for no more than the act required, and the question again recurs as to the construction of the 3d and 6th sections of the act.

If, however, it can be maintained that there is the variation between the contract and the act contended for, then a question arises as to its effect.

The Solicitor General, in his opinion heretofore cited, referring to the alleged variation between the contract and the act, says: "It seems to me that the fact that the principal here is the United States, that its plan of contract is therefore, in a certain sense, *public policy*, and that in the case before us what has happened is, that events have conformed to the declared policy of the Government, and that its views have succeeded, making the case stronger for the position that *substantially* the relation between the parties remain unbroken, in my opinion the matters in which the contract has been violated are *not substantial*."

If this contract is to be tested by the rules governing the relation of principal and agent, then the variation referred to would be of no effect.

"When a man doth less than the commandment or authority committed to him, then the commandment or authority being not pursued the act is void, and while a man doth that which he is authorized to do, *and more*, then it

is good for that which is warranted and void for the rest." (Co. Lit., 258, A.)

We conclude this head of discussion by again calling attention to the finding that the "contract was entered into in pursuance of the proposal" of the company, and in the proposal it is distinctly stated that until the new steamers could be constructed the company proposed to perform the service on the steamers theretofore accepted.

All that the record contains in opposition to the construction we have placed on the Act of 1872 is contained in the 9th finding, wherein it is stated that the company on the 11th February, 1874, were paid for sea-postages—$1,510.81; and that afterwards, the Department, recognizing the right to sea-postages, issued its warrants for the same, to wit: For the sums of $5,195.61 and $2,904.23; but the claimant, on the 6th April, 1875, declined to accept the same, and insisted on its full rights under the contracts of 1872 and 1873.

The payment of this small sum will not discharge the large amount due upon the contract as we have interpreted it.

Nor does its receipt amount to an estoppel, for no injury has resulted to the Government thereby.

It appears from the opinion of the Attorney General of August, 1874, in answer to the communication of the department of the 22d of July, that the company was then insisting upon the construction now maintained. This was a few months after the first payment.

While, therefore, the acts of parties to an agreement may be referred to as indicating the nature of their agreement, the case presented does not justify the conclusion that the company cannot now be heard in claiming the rights conferred by the contract.

Assignment of Error.

On these views we submit that the judgment of the court, which limited the recovery to the single voyage made by the City of Pekin, is erroneous, and that the judgment should have been for all the voyages made by the company's ships, less the amount of sea postages and all penalties for omissions and irregularities.

UNITED STATES
vs.
PACIFIC MAIL S. S. COMPANY. } No. 202.

The United States seeks to reverse the judgment that "the claimant is entitled to recover for the voyage of the steamship Pekin the sum of $41,666.66."

On the 22d of July, 1874, the Postmaster submitted to the Attorney General a letter from the company, under date of 8th of July, requesting the inspection and acceptance of its new ships, the City of Pekin and City of Tokio, under the contract of August 23d, 1873.

The question submitted to the Attorney General for his decision being "whether or not the contract (it not having been annulled by the Postmaster General) in an *existing agreement*, under which the steamers could be inspected and accepted for the service authorized by the act of 1st of June, 1872, or whether the continuance or abolition of the additional monthly service is at the option of the Postmaster General, or whether it has absolutely fallen by operation of law."

In the opinion given by the Solicitor-General, after referring to the annual report of the Postmaster General, made to Congress on 14 November, 1873, in which it is stated that he has not felt at liberty either to annul the contract or to give assurance for its continuance—it is added—

The situation of the parties to the second contract was made the subject of Reports to the Senate at its late session by the Committee on Naval Affairs and on Post Offices and

Post Roads. These agree in stating that the contract is still in force. No legislation occurred in that connection.

In my opinion (says the Solicitor-General) the contract is still obligatory, and the company is entitled to the inspection demanded, and to have its steamships, if accepted, placed in the additional mail service, the continuance or abolition of which is not within the option of the Postmaster-General.

Again, it is said, the company has done all that it can with its present resources to comply in good faith with the requirements stipulated for by the Postmaster-General; and the latter, far from suggesting a forfeiture, reports to Congress, in effect, that the contract ought to be held as still subsisting; and thereupon Congress, by an action, acquiesces in this view, which, at the close of the session, is endorsed by reports of two of its standing committees. In my opinion, the matters in which the contract has been involved are not substantial; and even if they were, the right to take advantage of such violation has been waived.

A separate opinion was given by the Attorney-General, who, without questioning the correctness of the views on which the Solicitor-General's opinion is based, places his approval of it on the following grounds:

1st. Looking to the object of the act of 1872, I am of the opinion that it was not an essential part of the contract that the new iron steamships should be furnished by 1 October, 1873, if, at that time, it appeared they would be furnished within a reasonable time thereafter.

2d. On the 1 October, 1873, it was well known by the Post-Office Department that the company was expending large sums of money in constructing such steamships as were required by the contract. But, instead of notifying the company that its failure as to time would be regarded as an end of the contract, the department, it seems, after-

wards treated the contract as still subsisting; and in view of that fact, and the subsequent proceedings in Congress, I do not believe it would be legal or right, now when the completed steamships have been presented for inspection, for the Government to refuse to receive them into service under said contract, because they were not furnished by the 1 October, 1873.

3d. Considering that the act provides for a contract to continue for ten years from the 1 October, 1873, and that the primary objects of this legislation were to subserve the interests of American commerce, and provide ships for the naval service of the United States in case of war, I think it would be subordinating the great ends of the statute to unimportant matters, to hold that the will of Congress upon the subject was wholly defeated by the failure of the company to furnish the iron steamships within a few months of the time fixed by a specification fixed in the contract, especially when such specification was outside of the requirements of the law authorizing the contract."

What followed these opinions is to be seen in the 8th finding of the court.

On the 8th August the Postmaster-General accepted for the service the steamships *City of Pekin* and *City of Tokio*, and gave the claimant notice of such acceptance by the following letter:

"POST-OFFICE DEPARTMENT,

"*8th August, 1874.*

"I have the honor to inform you that the board of naval officers detached by the Secretary of the Navy to inspect at New York the new iron steamships *City of Pekin* and *City of Tokio*, tendered by your company, under date of 8th July last, for inspection and acceptance for service in carrying the United States mails between San Francisco and China and Japan, under the contract of August 23, 1873,

have reported to me, under date 7th August, instant, that the requirements of the act of June 1, 1872, have been fully complied with in their construction and equipment, the said steamships being of the required tonnage, built of iron, and wholly of American manufacture, and so constructed as to be readily adapted to the armed naval service of the United States in case of war.

"The said steamships *City of Pekin* and *City of Tokio* are, therefore, accepted for the additional monthly mail service between San Francisco, Japan, and China, authorized by the act of 1st June, 1872, to take effect on their arrival at the port of San Francisco to commence said service; with the distinct understanding, however, that as no appropriation was made by Congress at its last session for the additional monthly service on said route, no payment can be made therefor, under the contract with your company, until Congress shall have further legislated upon the subject."

The 10th finding shows that on the 20th February, 1875, the steamship *City of Pekin* left San Francisco on her first voyage to Japan and China, and she arrived at Yokohoma on the 13th March and at Hong Kong on the 25th March, and on her return arrived at Yokohoma on 7th April and at San Francisco on 28th April, 1875. On the said voyage out and back, the *City of Pekin* carried the United States mails under the contract sued on.

Independent of the consideration that, in general, time is not considered as of the essence of the contract, and independent of the stipulation "that in case of *failure from any cause to perform any of the regular monthly voyages* a *pro rata* deduction shall be made from the compensation," we may confidently rest on the fact that Congress, possessed of the right to put an end to the contract at any time, did not choose to exercise the power.

On the contrary, fully informed by the annual report of

the Postmaster General, on Nov., 1873, that the company "is doing all that it can with its present resources to comply, in good faith, with the requirements of the contract at an early day," neither at that session, nor at the subsequent session, in which the continuance of the contract was the subject of several reports, was any action taken to terminate the contract.

Under these circumstances the agent of the Government was left free to continue the contract. The two steamers, fitted for war purposes, were completed and accepted, and it was not until after one of them had started on her voyage from San Francisco that Congress interposed its power to put an end to the contract.

If this were a contract between individuals, upon the plainest and most familiar doctrine, the principal would be estopped from denying liability to compensation.

Liability for the acts of others may be created either by direct authority given for their performance, or it may flow from their adoption, or from acquiescence in those acts.

The fact that the principal is the Government does not exempt it from the principles of justice applicable to ordinary contracts.

It was insisted in the court below that no recovery could be had for this voyage, in as much as the acceptance by the Postmaster General of the 8th August, 1874, was on the understanding "that as no appropriation was made by Congress at its last session, no payment could be made under the contract until Congress shall have further legislated."

This is in substance but a notification to the company that the Department was not in funds.

It was not intended to have, and could not have, any effect upon the rights and obligations of the parties to the contract.

P. PHILLIPS,

for Pacific Mail Steamship Company.

OFFICE SUPREME COURT U.S.
FILED
JAN 12 1881
JAMES H. MCKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1880.

THE PACIFIC MAIL COMPANY, APPELLANTS,
vs.
THE UNITED STATES:
AND VICE VERSA.
} Nos. 201 and 202.

BRIEF FOR THE UNITED STATES.

The suit in which these appeals occur was brought by the company to recover seven quarterly payments upon a contract (executed, first, August 29, 1872, and, secondly, August 23, 1873; Record, p. 14), under the act of June 1, 1872, to carry the United States mails between San Francisco and China, at an annual compensation of $500,000. It was admitted that, on account of certain offsets, the claim was reduced to $531,666.66.

The judgment below was for $41,666.66, and both parties appealed.

At the time of the enactment of the statute of 1872, of the making of the contract thereunder, and of the transactions which gave rise to this claim, the company

were already engaged in carrying the United States mails upon the route referred to, under a contract made upon the 16th of October, 1866, to run for ten years. By this contract the company were to maintain a *monthly* line of steamships. By the additional effect of that of 1872–'73, this service was to become *semi-monthly*, the ships of the *first* line leaving San Francisco about the *first* and those of the *second* about the *middle* of the month. Under the earlier contract, the ships were to be "of from 3,500 to 4,000 tons" (Record, p. 8, bottom). Under the latter, the transportation was to be "by an additional monthly line of first class American steamships, to conform in all respects to the requirements and provisions of the third section of the act of Congress above cited, approved June 1, 1872," &c., so "that the steamships hereafter offered for the service shall be of not less than 4,000 tons register each, and shall be built of iron." (Record, p. 3, bottom, &c.)

In 1872, before the execution of the second contract, the company had placed a second line of steamers on the route in question, making practically a semi-monthly service, and upon these the mails were carried from May 16, 1872, payment therefor in *sea postage* (see 17 Stat., 316, sec. 269) being requested by the company, and being received up to September 20, 1873, and independent of the contract of 1866.

The additional service required by the act of 1872 was to extend over a term of ten years from and after the 1st of October, 1873.

Upon the 24th of October, 1873, a note was sent at the instance of the Postmaster-General to the president of the claimant company, which, after calling attention to the fact that recently before the latter had *verbally*

explained to the Postmaster-General the causes which had prevented the company from commencing the additional mail service, &c., requested a *written* statement thereof *for filing*, &c. (p. 14). To this the company, through a vice-president, replied upon November 1, explaining "the reason of *our* failure to have placed the ships on the line as per contract" (p. 15). After stating reasons growing out of the difficulty of constructing new steamships of the size required, and expressing regret that the service *had not been commenced at the specified time*, and bespeaking *leniency*, this reply asks "attention to the fact that *we* are performing the semi-monthly service with our mail steamers now accepted as such by the department under our first China mail contract, &c., and with these, &c., we propose to perform a semi-monthly service until the ships referred to (those in process of construction) shall take the place of the wooden mail steamers now on the line; to all of which we ask your kind permission." "We would also beg your attention to the fact that in May, 1872, we put on a semi-monthly line of steamers between San Francisco and China," &c. "In conclusion, we beg to submit for your consideration the full facts as presented herein, and we hope that you may find it entirely consistent and within your power to allow us to continue the service as we are now doing until we shall be able to place our new ships upon the line," &c.

No iron steamship was offered for service under the contract of 1872–'73 until August, 1874; whereupon, upon the 8th, the steamships Tokio and Peking were accepted by the Postmaster-General (Record, p. 17).

After October 1, 1873 (when the second contract was to be put in execution), the company *continued* to dis-

patch steamers about the middle of each month, in part such as had been accepted under former contract and, in part, such as had not been; [in this respect corresponding with the line that had been in use since May 16, 1872. See Finding III, p. 11]. Upon the 11th of February, 1874, *sea postages* were received by the company for such service up to December 31, 1873 (p. 18). For like service to September 17, 1874, and again to December 31, 1874, the department *recognized* the right of the company to certain amounts as *sea postages*, and accordingly warrants were issued for such amounts, but on the 6th of April, 1875, the company refused to receive such amounts as compensation, and made claim under contract of 1872–'73 (p. 18).

The Peking commenced her first voyage from San Francisco on the 20th of February, 1875, and carried the United States mails thereon out and back, under the contract sued on (p. 18, bottom).

By virtue of a clause therein contained, Congress, by statute of March 3, 1875, annulled the contract of 1872–'73.

The amount allowed as above by the Court of Claims, was upon account of the service performed during the above-mentioned voyage of the Peking.

I. As regards the appeal by the company:

From the *findings* it appears that the claimants, although bound under the contract of 1866 for a *monthly* mail service only, had been keeping up a *semi-monthly* one upon the route in question since May, 1872, and that they continued such service after the time for entering

upon their second contract had elapsed: That this service so far as not covered by the contract of 1866 was what is known as *recognized*, and was paid for accordingly, not only up to the time when the second contract was to be entered upon, but also for the first quarter afterwards: That for two distinct periods after the close of such quarter, extending to December 31, 1874, the Post-Office Department *recognized* further service of the same sort: And that no protest or dissent from this view of the Government was expressed by the company until April 6, 1875, when for the first time claim was made that since October, 1873, the service had really been under the contract of 1872–'73, and that payment was due accordingly.

This second sight may have been due to the passage of the act of March 3, 1875, by which the contract of 1872–'73 was annulled, so that no further favors [leniency] could be expected from the Postmaster-General thereunder.

The sum of the matter is that up to the time of the sailing of the Peking, in February, 1875, a state of dealing had continued in the same precise form from the 16th of May, 1872. This state of dealing had been recognized, both before and after the second contract, as justifying certain compensation. That contract perhaps might have justified the Postmaster-General in accepting such dealing after the date of the second contract as referable thereto. However, he was never asked to consider this question, or so to accept the dealing. Upon the contrary, his official transactions show that he regarded and acted upon it as a continuance of the previous dealing. For a part of that time (viz, until December 31, 1873,) this view was to all appearance

sanctioned by the claimants; and they did not contradict it until all *prospective* action thereunder was at an end, and the government had lost all power to alter the position which it had occupied under the contrary theory sanctioned by the claimants, as above.

Certain language in the note of the vice-president of the company of November 1, 1873, which may be referred to as showing *notice* that they were then executing the contract of 1872–'73, appears by its context to have been used *diverso intuitu*, or at least ambidextrously, and not by way of the distinct notification to which the United States were then entitled. For the United States, by note of October 24, previously, had asked *why* the company had not commenced the performance of the additional service; referring to the circumstance that shortly before they had been told *why*, "verbally," and wanted the information in writing, so as to be filed.

All this seems sufficiently distinct and solemn.

In reply, after consideration, the company specifically admits a "failure to have placed the ships on the line as per contract."

What follows is to be construed in the light of this admission. Whether the new contract was to be carried out by new ships exclusively, or partly by such, and partly by ships already *accepted* for that route under the contract of 1866, the company admit that *no ships* had been placed upon the new line, and ask *leniency* therefor, upon grounds stated—amongst others, because a semi-monthly service was in fact then being executed by them, and had been so since May, 1872. The acceptance by the company of *recognized* compensation in February, 1874, and their subsequent silence in regard to such compensation, until April, 1875, are to the same purpose.

It seems impossible to doubt that at that time both parties understood that in what they were then doing the company, far from standing *upon any supposed rights* under the second contract, were acting only *provisionally*, with the view, at most, of conciliating the favor of an officer who was supposed to have it in his power to declare the second contract forfeited because not entered upon in due time. If so, no subsequent accidents or exigencies can impart to this dealing the color of having been done in *fulfillment of the second agreement.*

II. As regards the appeal by the United States.

For error herein is assigned the conclusion of law that the claimant is entitled to recover for the voyage of the Peking.

The liability of the United States for the $41,666.60 depends upon the question whether under the action or *non-action* of the company, in respect to the contract of 1872–'73, up to the time of the tender of *the Peking*, that contract had not become *void*, and therefore incapable of being set up for any purpose by any consent or acquiescence on the part of the Post-Office Department.

The question here presented is substantially *one of interpretation* only, inasmuch as the principles regulating contracts for service and determining the inability of executive officers of the United States to vary at discretion contracts solemnly made with the government are plain.

So far as not therein expressly otherwise provided, it

is submitted that *time* is of the essence in such contracts, and that an official power to dispense with such element does not exist. *Perhaps* a contract *to carry the mail* is especially amenable to such a rule.

The statute of 1872 is set out in the learned brief of Messrs. Farnsworth & Chandler for the claimant, and the contract in question is to be found upon pp. 4, &c., of the record. Upon behalf of the United States it is submitted that both the statute and the contract contemplated an execution of the new service *in new iron steamships only*, and that this interpretation is fortified by the contemporaneous exposition thereof in practice by the parties.

SUPREME COURT OF THE UNITED STATES.

No. 507.

THE GERMAN NATIONAL BANK OF CHICAGO, APPELLANT,

vs.

MARK KIMBALL, COLLECTOR OF THE TOWN OF SOUTH CHICAGO, AND SAMUEL H. McCREA, TREASURER, &c.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-room, in the city of Chicago, in the district aforesaid, before the judges thereof, on Saturday, the eighteenth day of May, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the one hundred and second.

WILLIAM H. BRADLEY, *Clerk.*

THE GERMAN NATIONAL BANK OF CHICAGO
v.
MARK KIMBALL, AS COLLECTOR OF THE TOWN of South Chicago. } In chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the sixteenth day of February, A. D. 1878, came the said complainant, The German National Bank of Chicago, by Messrs. Tenneys, Flower and Abercrombie, its solicitors, and filed in the office of the clerk of the circuit court of the United States for
2 the northern district of Illinois, at Chicago, in the district aforesaid, its bond for costs and bill of complaint in said entitled cause, which said bond and bill of complaint are respectively in the words and figures following, to wit:

Bond for costs.

Circuit court of the United States, northern district of Illinois.

THE GERMAN NATIONAL BANK OF CHICAGO
v.
MARK KIMBALL.

Security for costs.

I enter myself security for costs in the above-entitled cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by it, I hereby agree and stipulate that execution may issue against my property for any such costs.

Dated this sixteenth day of February, 1878.

D. K. TENNEY.

(Endorsed:) Filed Feb'y 16th, A. D. 1878. Wm. H. Bradley, clerk.

Bill of complaint.

In the circuit court of the United States for the northern district of Illinois. In chancery.

3 To the judges of the circuit court of the United States for the northern district of Illinois:

The German National Bank of Chicago, a banking association organized and existing under the banking laws of the United States, and located and doing business in the city of Chicago, in said district, brings this its bill against Mark Kimball, as collector of the town of South Chicago, in said district, defendant, and thereupon your orator complains and says:

That Mark Kimball, the defendant, is the collector of taxes for the year 1877 in the said town of South Chicago, in the county of Cook, in said district, duly appointed and qualified and now acting as such, pursuant to the laws of the State of Illinois; and that he has received from the county clerk of said county the tax-lists and books showing the taxes levied and assessed for the year 1877 against the real and personal property of said town, together with the usual warrant requiring him to make collection of such taxes, and that he now has possession of such tax-lists and is proceeding and attempting to collect such taxes.

That your orator is a national bank, duly organized under the
4 national banking law, and having its office and place of business in said town of South Chicago; that its chartered capital is five hundred thousand dollars, which is divided into five thousand shares of one hundred dollars each, which shares, on the first day of May last, were held by seventy different persons, some of them residing in the city of Chicago and elsewhere in the State of Illinois, and others in the different States of the United States and in Europe; that all of said shares of stock were duly listed for assessment and taxation in the names of the then stockholders, and that taxes have been levied against the same to the amount of thirteen thousand five hundred and forty-three and $\frac{5}{100}$ dollars in the aggregate, and that the said collector now demands and insists upon the payment thereof.

That by the revenue law of the State of Illinois it is made the duty of the managing officer of a national bank to withhold, from dividends made to its shareholders, an amount sufficient to pay the taxes levied upon such shares, and failing to do this such officer is made personally liable to pay such taxes; that it has been the custom of your orator, and of the other national banks in the city of Chicago, to pay for its stockholders all taxes legally levied against their repective
5 shares of stock, and to that extent it is in fact the trustee o f its shareholders; that by said law such taxes are made a lien upon the respective shares of stock against which the same are levied until paid, and in case of non-payment the contractor is authorized to sell such shares for the purpose of paying the same, and compel a transfer thereof to the purchaser upon the books of the bank.

That since the assessment and levy of said taxes your orator has gone into voluntary liquidation as it lawfully might do under the "national banking act," and is now winding up its affairs preparatory to closing its business; that it has recently become and is now the holder of one hundred and fifty shares of the capital stock of said bank, of the face value of fifteen thousand dollars, which shares have been taken in settlement of, or as security for, debts due it from insolvent stockholders, and that to the extent aforesaid it is directly interested in the matters in controversy herein and in the event of this suit.

That a large indebtedness exists upon the part of said bank to its depositors and others, and although the assets of said bank are very considerable, it is impossible now to determine whether there will be
6 a surplus to divide among stockholders after paying its debts, or whether there will be a deficiency to be made up by an assessment upon its stockholders; that the shareholders of said bank claim and insist that all of the taxes levied and assessed in the said town of South Chicago for said year 1877, upon and against their respective shares of stock, are illegal and void for the reasons hereinafter set forth, and direct your orator not to pay the same, and threaten to bring suits against it if it should do so, while, on the other hand, the collector of

said town threatens to, and will as your orator believes, sell said shares of stock for the purpose of making the amount of said taxes unless the same shall be shortly paid; that a sale of said stock would prove a serious embarrassment to your orator and create great confusion in closing up its affairs, and would give rise to so much doubt as to the liabilities of stockholders upon an assessment, in case one should be made, as to cause serious loss and injury to its depositors.

That if your orator should voluntarily pay said taxes, it would give rise to a multiplicity of suits between it and its stockholders, and in case of deficiency would be an illegal appropriation of moneys thereto which belong to depositors; and if said shares of stock should
7 be sold by the collector it will seriously interfere with, if not prevent, the collection of an assessment from its stockholders should one become necessary.

That no provision is made by the revenue law of the State of Illinois for the refunding of taxes which have been paid, even though the same have been levied upon a void assessment, and in case said shares should be sold there is no adequate remedy at law for the injury which would ensue in the event that said taxes should ultimately be held void.

And your orator further shows that it is provided in the constitution of the State of Illinois that "the general assembly shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property, such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct and not otherwise," and that in pursuance of such constitutional provision, the general assembly of the State of Illinois have, by statute, provided among other things that in each town the assessor thereof "shall assess all personal property at its fair cash value."

8 And your orator further shows that during the year 1877 one William B. H. Gray was elected assessor of the town of South Chicago aforesaid, and qualified and acted as such, and that he pretended to make an assessment of all the personal property of said town upon lists and books furnished him for that purpose by the county clerk of Cook County, and that on or about the 28th day of July, A. D. 1877, he made return to said county clerk of sundry assessment books, which, taken as a whole, purported to be a legal and uniform assessment and valuation of all the personal property in the town of South Chicago for said year; that each of said assessment books in addition to the oath of office has annexed thereto the following affidavit, to wit:

STATE OF ILLINOIS,
Cook County, ss:

I, Wm. B. H. Gray, assessor of the town of South Chicago, do solemnly swear that the book to which this is attached contains a correct and full list of all the personal property in the town of South Chicago, so far as I have been able to ascertain the same, and that the assessed value set down in the proper column opposite the several kinds and descriptions of property is in each case the fair cash value of such property, to the best of my knowledge and belief (except as corrected by the town board), and the footings of the several columns in said book and
9 tabular statement returned herewith are correct, as I verily believe.

WM. B. H. GRAY,
Assessor of the town of South Chicago.

Subscribed and sworn to before me this 28th day of July, A. D. 1877.
[SEAL.] HERMAN LIEB,
County clerk.

And your orator further shows that in making the assessment of personal property for said town, the said assessor disregarded and ignored the positive provisions of the revenue law requiring him to assess the same at its fair cash value, and set up an arbitrary standard of value of his own in opposition thereto and did not assess nor intend to assess any of such property as to exceed one-third of its fair cash value, and that, in fact, he assessed the most of it at from one fifth to one-twentieth of its fair cash value; and that as to other provisions of said law requiring property owners to list their personal property and make returns thereof under oath, he purposely waived and ignored the same, so that fully one-half of such property escaped taxation altogether; that not more than one-half of the tax-payers of said town made returns at all, and of the returns that were made many were not signed by the parties making them and a still greater number were not sworn to.

10 That it appears from said assessment roll that on the 1st day of May last there were in said town twelve national banks, the shares of stock in which were assessed as follows:

	No. of shares.	Face value.	P'r cent.	Ass'd value.
First National Bank	10,000	$100	34%	340,000
Third National Bank	7,500	100	34%	255,000
Fifth National Bank	5,000	"	34%	170,000
Union National Bank	10,000	"	34%	340,000
Merchants' National Bank	5,000	"	34%	170,000
Northwestern Nat'l Bank	2,000	"	34%	68,000
Central Nat'l Bank	2,000	"	23%	46,000
Com. Exch. Nat'l Bank	5,000	"	34%	170,000
Nat'l B'k of Illinois	5,000	"	34%	170,000
Traders' Nat'l Bank	2,000	"	34%	68,000
Com'l National Bank	5,000	"	34%	170,000
German National Bank	5,000	"	34%	170,000

The market value of said stock, as well as its fair cash value, ranged from par or one hundred dollars per share to two hundred and thirty dollars per share on the 1st day of May last, which values were well known to the world and to said assessor; notwithstanding which, said assessor assessed them at from one-third to one-seventh of their actual and fair cash value, in violation of law, and with the exception of the Central National Bank assessed the values of said shares at precisely the same arbitrary sum, without reference to their relative values and in violation of the constitutional provision requiring property to be

11 so assessed that each person shall pay a tax in proportion to the value of his property.

That it further appears from said assessment roll that there were in said town, liable to assessment and taxation, and which were severally assessed in the sums set opposite thereto respectively, the following banks and banking institutions, organized under State laws and branches of foreign banks, to wit:

Bank of Montreal, moneys	$100,000 R.
Canadian Bank of Commerce; moneys, $32,500; furn., $500.	33,000 A.
Chicago Savings Institution & Trust Co.	1,000 A.
Dime Savings Bank; bonds, $100; furniture, $300;	400 R.
Fidelity Savings Bank; money, $24,500; furniture, $500;	25,000 A.

German American Bank; money, $5,300; furniture, $500.		5,800 R.
German Savings Bank; money, $1,670; furniture, $1,000.		2,670 R.
Hibernian Bank'g Assoc'n; money, $15,000; furniture, $1,000		16,000 A.
Hide and Leather Bank; money, 30,500; furniture, $600.		31,100 R.
Illinois Trust & Savings Bank; moneys, credits, bonds, &c.		83,670 R.
International Bank; money, $12,640; bonds, $200		12,840 R.
M'ch'ts', Farmers' & Mech. Sav'gs' Bank; money, $20,000; credits, $5,000; furn., $500		25,500 A.
Merch'ts' Sav'gs, Loan & Trust Co., moneys		500,000 A.
State Savings Institution, "		65,000 A.
Union Trust Co. Bank, furniture		1,000 R.
Total assessment		902,980 R.

That of the above banks, those which have "R" marked opposite in the right hand margin purports to have made returns to the assessor, though some of them are not sworn to and do not purport to give their assets in detail, while the remainder appear to have been assessed
12 without return made.

That said assessment, instead of being an assessment of the moneys, credits, and effects of said banks, either in detail or as a whole at their fair cash value, is so far below it as to be absolutely absurd and ridiculous, more especially as it was and is a fact well known to the said assessor and to the public that the Merchants' Savings, Loan and Trust Company, one of said banks, seldom, if ever, has less than two millions of dollars in money alone in its possession liable to taxation, to say nothing of its credits and other property.

That most of the banks aforesaid are corporations existing under the laws of the State of Illinois; that none of the shares of stock of the stockholders in said banks are assessed in any manner by said assessor as required by law, but on the contrary the said assessor wilfully and intentionally omitted the same from his assessment roll and neglected to assess and return the same, and that the capital stock and franchises of said banks were none of them assessed in any manner or form whatever, and wholly escaped taxation, although publicly known to be of the value of many millions of dollars; and your orator charges that the total assessed valuation of the banks in said town (other than na-
13 tional banks) does not much, if at all, exceed ten per cent. of the fair cash value of their tangible property, capital, and franchises, and that because of the failure of said assessor to assess the shares of stock in said State banks and of the State board of equalization to assess the capital stock and franchises thereof, your orator says that an unjust, unreasonable, illegal, and fraudulent discrimination has been made by the authorities between the shareholders of State banks and national banks, to the great injury and damage of the latter and in violation of the revenue law of the State and of the national banking act.

That at the time aforesaid there were eighteen private bankers and banking firms doing business in said town, against whom assessments were returned as follows:

J. M. Adsit	moneys, &c.	$4,740 00
H. J. Christoph	"	460 00
H. Clausenius & Co	"	670 00
M. Felsenthal	"	1,100 00
Felsenthal and Kozminski	"	3,270 00

Follansbee & Son		"	800 00
Gerhard Foreman		"	9,000 00
H. Greenebaum & Co		"	3,600 00
Emil Josaphat		"	1,500 00
Leopold Mayer		"	1,050 00
Meadowcroft Bros		"	250 00
C. L. Niehoff & Co		"	2,800 00
	Peterson & Bay	"	1,500 00
14	Preston, Kean & Co	"	2,000 00
	Lazarus Silverman	"	9,000 00
A. O. Slaughter		"	2,500 00
Snydacker & Co		"	3,150 00
John H. Wrenn & Co		"	1,000 00
	Total assessed valuation		$47,790 00

Of which about forty thousand dollars is assessed as money, about twelve hundred as credits, &c., and the balance as furniture; and your orator alleges and insists that the said aggregate assessed valuation of the said private bankers and banking firms is not in fact five per cent. of the aggregate fair cash value of their personal property liable to assessment and taxation for said year.

That at the time aforesaid there was enrolled in said town of South Chicago three hundred and nine steamboats, sailing vessels and other water-craft which were listed and were liable to assessment for said year; that the assessed valuation of said water-craft ranged from one hundred dollars to four thousand dollars each, the steamboat Peerless being the only one assessed at the higher figure named, and that the aggregate valuation of all of said boats and vessels as returned by said assessor was one hundred and sixty thousand four hundred and seventy-five dollars, or an average of about five hundred and twenty dollars each; that the fair cash value of such vessel property, as a whole,
15 was well known to the said assessor and the public to be, and was in fact, not less than from one and one-half to two millions of dollars; and your orator charges that said assessor purposely and knowingly assessed said property at not to exceed one-tenth of its fair cash value, and that such wilful undervaluation operated as a fraud upon your orator and other tax payers in said city.

And your orator further shows that as to the other corporations, individuals, and firms doing business in said town of South Chicago, no effort whatever was made to ascertain the moneys, credits, stocks and bonds held and owned by them respectively on the 1st day of May last, or to ascertain the amount of tangible property, such as merchandise and manufactured articles, then owned by them, or the fair cash value thereof, and that tax payers were permitted to name the gross sum at which they were willing to be assessed without listing or enumerating their property at all, and that said assessor in many, if not most, instances accepted the sum so named without the exercise of any judgment upon his part, and well knowing that it represented but a small part of the fair cash value of the property of such persons liable to assessment and taxation; that the following schedule shows a por-
16 tion of the individuals and firms so assessed, the amounts assessed against each, and what your orator believes to be the fair cash value of all personal property, including moneys, credits, &c., held by each of them respectively on the 1st day of May last which were lia-

ble to assessment and taxation, after deducting from the item of credits all such indebtedness, &c., as is authorized by law:

Names.	Assessed value.	Fair cash value of all personal property.
Field, Leiker & Co	$500, 000	$5, 000, 000 00
A. T. Stewart & Co	150, 000	1, 500, 000 00
Stettauer Bros. & Co	55, 000	750, 000 00
Carson, Tirie, Scott & Co	30, 000	400, 000 00
Chas. Gossage & Co	25, 000	250, 000 00
H. A. Kohn & Bros	48, 000	700, 000 00
C. T. Kellogg & Co	48, 000	700, 000 00
H. W. King & Co	48, 000	500, 000 00
Clayburgh, Einstein & Co	15, 000	150, 000 00
Field, Benedict & Co	7, 000	150, 000 00
Foreman and Friedlander	2, 300	50, 000 00
King Bros. & Co	7, 500	100, 000 00
Sweet, Dempster & Co	10, 000	150, 000 00
Keith Bros	50, 000	500, 000 00
Durand & Co	30, 000	500, 000 00
Reid, Murdoch & Fischer	40, 000	750, 000 00
J. W. Doane & Co	15, 000	200, 000 00
C. M. Henderson & Co	35, 000	400, 000 00
M. D. Wells & Co	35, 000	400, 000 00
M. Selz & Co	25, 000	300, 000 00
Phelps, Dodge and Palmer	15, 000	150, 000 00
17 John V. Ayer & Son	10, 000	200, 000 00
Chicago Gas & Coke Company	120, 000	1, 500, 000 00
Downer & Bemis Brewing Co	23, 300	300, 000 00
D. B. Fisk & Co	25, 000	300, 000 00
Geo. P. Gore & Co	10, 000	150, 000 00
Abstracts of titles	20, 000	500, 000 00
Markley, Alling & Co	20, 000	250, 000 00
Wahl Brothers	10, 000	250, 000 00
Hibbard & Spencer	40, 000	400, 000 00
	1, 469, 000	17, 500 000 00

No. of houses, 30.

The same general undervaluation, and at rates varying from one-fifth to one-twentieth of the fair cash value of personal property, runs through the entire assessment for said town, and what with the shiftings and evasions of tax payers permitted and winked at by the assessor, by means of which an immense amount of property escaped assessment altogether, and what with the excessively low valuations placed upon the property that was assessed by said assessor, the personal property of the town of South Chicago, which is really worth at fair cash value from one hundred and fifty to two hundred millions, was returned at a valuation of less than twelve millions.

And your orator further shows that with but three or four exceptions none of the numerous and wealthy corporations of said town are assessed upon their capital stock or franchises, and that none of the
18 tangible property of such corporations is assessed at more than one third of its fair cash value, much of it not to exceed one-tenth, and a great deal of it not at all; notably among these, in addition to the State banks hereinbefore referred to, is the Chicago Gas and Coke Company, with a capital of one million of dollars and upwards, whose shares of stock were quoted on the first day of May last at $140.00 per share and whose tangible property was assessed at only one hundred and twenty thousand dollars.

And your orator further shows that although ample authority is given to the said assessor and he is required by law to ascertain the amount of moneys, credits, bonds, and stocks held by banks (other than national banks), bankers, corporations, firms and individuals liable to taxation, yet so carelessly, negligently, and fraudulently did he conduct himself in the discharge of his said office that notwithstanding the fact that it requires millions of dollars in money to transact the business of each day, and that every merchant in good standing is known to have and necessarily must have in hand or on deposit subject to check large sums of money, and also large credits over and above any deductions, almost all of that class of property wholly escaped taxation;

19 and your orator charges that not only did the said assessor omit to comply or require tax payers to comply with the law requiring such classes of property to be listed for assessment, but he also meant that such property should not in fact be assessed, and that with such object in view he purposely and intentionally waived and disregarded all the provisions of law enacted by the general assembly for the express purpose of enforcing a fair listing and return of such property, to the end that it might bear its proportion of the burden of taxation.

That it appears from the return of said assessor that the following classes of personal property in the town of South Chicago, outside of banks and bankers, were assessed by him as follows, to wit:

Moneys of others than bankers, &c., about	$70,000
Credits of others than bankers, &c., "	28,000
Stocks and bonds less than	5,000

And that, including all the moneys, credits, bonds, and stocks of all the banks (except national banks), bankers, brokers, corporations, firms, and individuals of every occupation, class, and condition in life, in said town of South Chicago, the total valuation thereof as returned by said assessor does not exceed twelve hundred and fifty thousand dollars, which is but a mere fraction of the property of those classes in such town liable to assessment.

20 And your orator further says that from the abstracts of the county clerks of the various counties in the State of Illinois, certified to the State auditor, showing the assessed valuations of personal property in said counties, respectively, and from the aggregate thereof, showing the total assessed valuation of personal property for the entire State, and from the proceedings and reports of the State board of equalization, it fully and clearly appears that in many respects the assessments made in the the county of Cook, in which the town of South Chicago is situated, are not only fraudulent and void as to their respective localities and the inhabitants and taxpayers thereof but, are likewise a fraud upon every other locality in the State.

The assessed valuation of certain classes of property in Cook County and also in the entire State, and the relative proportion of the same, is shown by the following table, to wit:

Property.	Assessed valuation for State.	Assessed valuation Cook County.	Proportion.
Credits of banks, &c	$1,288,980 00	$10,885 00	1/120
Money of others than banks	12,629,085 00	303,339 00	1/40
Credits of others than banks	19,562,191 00	77,412 00	1/254
Bonds and stocks	891,065 00	7,040 00	1/127

21 Notwithstanding Cook County contains nearly one-sixth of the

entire population of the State, and fully one-fourth, if not more, in value of the personal property of the State, yet there are thirty-six counties which exceed it in the aggregate assessed valuation of its bank credits; eight counties in moneys of others than bankers, &c.; sixty-one counties in credits of others than bankers; and twenty-two counties in bonds and stocks. The assessed valuation of bonds and stocks in Rock Island County is forty-five times larger than that of Cook County and sixty times greater than that of South Chicago.

In the class of steamboats, sailing vessels, &c., the number listed in Cook County is 363; value, $180,325; average value, $496.76. In balance of State, 301; value, $510,897; average value, $1,700.00; the average for the State outside of Chicago being 3½ times more than the average for Cook County. Fifty-four of said steamboats and vessels are listed and assessed in St. Clair County in said State at $346,000.00; an average valuation of six thousand four hundred and seven dollars, which average value is twenty-four hundred and seven dollars more than the highest assessed value of any steamboat or other craft in the town of South Chicago.

22 And your orator further shows that the total assessed valuation of the personal property of the town of South Chicago as returned to the county clerk was eleven millions nine hundred and ten thousand five hundred and eight dollars ($11,910,508.00); that the total assessed valuation of personal property for the entire county of Cook as certified and returned by the county clerk to the State auditor was nineteen million three hundred and twenty-two thousand nine hundred and eighty dollars ($19,322,980.00), which said certificate and abstract of taxes were laid by said auditor before the State board of equalization for the State of Illinois; that in equalizing the assessments for said State, the said board directed and required that fifty-seven per cent. should be added to the said total assessed valuation of personal property for Cook County, making the total valuation as so equalized and assessed thirty millions seven hundred and thirty-nine thousand nine hundred and twenty-eight dollars ($30,739,928.00); and the said equalized and assessed valuation of said State board of equalization was duly certified and returned to said county clerk of Cook County; that by the revenue law of the State of Illinois it is provided that the county clerk shall extend rates for taxes on the assessed valuation of

23 property as equalized and assessed by the State board of equalization, and your orator insists that after the same has been so ascertained and determined, no power or authority exists or is vested in any person or body to increase or decrease such equalized assessment, or to extend taxes upon any other or different basis or valuation, notwithstanding the county clerk of Cook County, without authority of law and in violation of the foregoing statutory provision, proceeded to and did extend the rates of taxes upon and against personal property in the town of South Chicago, as follows:

To the assessed valuation as returned by the assessor for said town	$11,910,508
He added 20 %	2,382,102
Making an aggregate of	14,292,610
To which aggregate he added 57 %	8,146,788
In all	$22,439,398

The amount so added illegally and without authority being fully sixteen per cent. of the original assessment.

That by reason of such unlawful increase in the valuation of personal property for said town of South Chicago, and extending the rates for taxes thereon, the sum of fifty-three thousand three hundred and eighty dollars was added illegally to the assessed valuation as equalized of the said shares of stock in said German National Bank, and the
24 taxes increased thereon in like proportion, being about one-sixth of such assessment and taxes; the total valuation upon which said rates were actually extended is about sixty-five cents on the dollar of the face value of such shares, instead of thirty-four per cent. as originally assessed, and about fifty-three per cent. as equalized by the State board.

And your orator further shows that the shares of stock of said bank are taxed about eight per cent. on the assessed value thereof, as returned by said town assessor, and between four and five per cent. of the valuation thereof as equalized by the said State board, and illegally increased as aforesaid by the county clerk, while upon any approximately fair valuation of the personal property of said town at its fair cash value the percentage of tax thereon would not exceed one per cent.

And your orator charges and insists that the assessment of said town, instead of being made in accordance with the revenue law of said State, and pursuant to its provisions, was wilfully, deliberately, and fraudulently made in direct violation thereof; that the said assessor, instead of adopting the rules and standards prescribed by law for ascertaining the amount of property in said town and determining the values
25 thereof, purposely disregarded the same and fraudulently set up a standard of values of his own on which to make such assessments, in direct violation of such law; that because of his wilful disregard and disobedience of some of the provisions, and his deliberate and intentional violation of others of said revenue law, more than one-half of the personal property of said town escaped taxation altogether, and the remainder is assessed upon a shifting, varying, and uncertain basis or standard of values, dependent largely upon the whims, caprices, integrity, or want of integrity of the owners, instead of the standard of the fair cash value as required by law and the judgment of the assessor; that thereby the taxes upon said shares of stock and other property in said city has been immeasurably increased, and your orator and others made to bear far more than their just and equitable proportion of the burdens of taxation; that the taxes levied in the town of South Chicago upon personal property for the year 1877 are based upon the illegal, unauthorized, inequitable, and fraudulent assessment aforesaid, as the same had been returned and equalized, or pretended to be equalized, by the boards of equalization of the town, county, and State
26 respectively, and unlawfully increased as aforesaid by the county clerk.

That, as your orator is advised and believes, an assessment or valuation of property for the purpose of taxation, is, in its nature, jurisdictionable, and the positive provisions of law authorizing and directing such assessment must be substantially complied with, and it must be reasonably fair and uniform in its character in order to lay the foundation for a valid tax; that an assessment made by an officer in direct violation of law, and upon a standard of values in wilful and fraudulent opposition and disregard of the standard prescribed by statute, and which is, in all respects, intentionally unreliable and inequitable as to the property assessed, and the uniformity of the value placed thereon, is a fraud upon the law, the public, and individuals, except as to those who escape taxation altogether, or are so meagrely assessed that it

amounts virtually to about the same thing; that no approval nor equalization of an assessment so made, nor amendment thereto made by any of the several boards of equalization can legalize the same, nor give it vitality, nor make it the foundation of a legal tax, the assessment being itself unauthorized and void, all subsequent proceedings and acts dependent thereon must fall, as well as all taxes extending thereon.

27 And your orator further shows that because of the non-assessment of large quantities of personal property in said town, and the absence of all uniformity of values in the assessments that were made, it is utterly impossible for your orator or for any person or persons to compute or ascertain what your orator or its stockholders ought to pay upon such shares of stock upon an approximately fair and equitable assessment of the personal property in said town, and that inasmuch as said tax is based upon an assessment which is made in violation of law and not in conformity with it, and is therefore wholly unauthorized and void, it ought not, equitably, to pay any sum as a condition of relief, although it would willingly do so were it possible to ascertain the proper amount.

And your orator further charges and alleges that the whole tax levied upon personal property in the town of South Chicago is absolutely null and void, for the following reasons, to wit:

1st. Because none of said property is assessed at its fair cash value as required by law.

2nd. Because the assessment upon which said taxes are based was not made upon any uniform standard of value, so as to make each individual or corporation pay a tax in proportion to the respective or relative value of his property.

28 3rd. Because the assessor of said town purposely and fraudulently omitted and neglected to assess and return fully one-half of such property.

That the taxes levied upon and against the shares of stock in national banks (including your orator) are fraudulent and void, and ought to be set aside for the following additional reasons:

1st. Because the assessor of said town wilfully and fraudulently omitted to assess the shares of stock in the State banks or any of them doing business therein as required by law.

2nd. Because such shares of stock were not assessed and taxed as other moneyed capital in the hands of individuals in said State, as required by the revenue law of Illinois and the provisions of the national banking law.

That nearly one-sixth of the taxes upon the personal property of said South Chicago, including said shares of stock, is illegal and void, for the additional reason that the county clerk of Cook County made an illegal and unauthorized increase of the assessment of such property to that extent.

Your orator therefore prays that the said pretended assessment for the town of South Chicago for the year 1877, and all subsequent proceedings and equalizations based, and the taxes purporting to be

29 extended against and levied upon the said shares of stock of your orator and its stockholders, be declared illegal and wholly unauthorized and void, and that the same be set aside and held for naught, and that your orator and its said shareholders be relieved from the payment of said tax and the whole thereof, and that the said Mark Kimball, as collector as aforesaid, his successor or successors in office, and his and their agents, deputies, and servants, be perpetually enjoined and restrained by the injunctional order of this court from col-

lecting or attempting to collect the said taxes or any portion thereof, and for such further or other relief as may be agreeable to equity.

And that in the meantime and until the further order of the court in the premises the said Mark Kimball, as such collector, his deputies, agents, and servants be temporarily enjoined and restrained from collecting or attempting to collect said taxes or any part thereof.

To the end, therefore, that the said defendant, Mark Kimball,
30 as collector of the town of South Chicago, may, if he can, show cause why your orator should not have the relief herein prayed for, and may make full, true, and perfect answer to the matters herein alleged, but not under oath, answer under oath being waived;

May it please your honors to grant unto your orator the writ of injunction issuing out of and under the seal of this court, according to the form of the statute in such case made and provided, directed to the said Mark Kimball, as collector of the town of South Chicago, enjoining and restraining him, his successor or successors in office, and his and their deputies, agents, and servants from collecting or attempting to collect the taxes, or any of them, levied upon or against the said shares of stock of your orator and its stockholders for the year 1877, until the further order of the court in the premises.

And may it please your honors to grant unto your orator a writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the said Mark Kimball, collector of the town of South Chicago, defendant, commanding him on a day certain therein to be named, and under a certain penalty, to be and appear in this honorable court, then and there to answer all and
31 singular thepremises, and to stand to, abide, and perform such further order, direction, and decree as may be made against him.

GERMAN NATIONAL BANK OF CHICAGO,
TENNEYS, FLOWER AND ABERCROMBIE,
Solicitors and Counsel for Compl't.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Albert M. Day, being duly sworn, deposes and says that he is the vice-president and managing officer of the German National Bank, the complainant in the above suit, and makes this affidavit in its behalf; that he has read the foregoing bill and knows the contents thereof, and that the same is true of his own knowledge except as to the matters herein stated on information and belief, and as to those matters he believes it to be true.

ALBERT M. DAY.

Subscribed and sworn to before me this 16th day of February, A. D. 1877.

PHILIP A. HOYNE,
U. S. Com. N. D. Ills.

(Endorsed:) Filed Feb'y 16, 1878. Wm. H. Bradley, cl'k.

And on the same day, to wit, the 16th day of February, A. D.
32 1878, a writ of subpœna issued out of said clerk's office to said defendant in said entitled cause, which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Writ of subpœna.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to Mark Kimball, as collector of the town of South Chicago, greeting:

We command you that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of April next, to answer the bill of complaint of the German National Bank of Chicago, this day filed in the clerk's office of said court in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 16th day of February, in the year of our Lord one thousand eight
33 hundred and seventy eight, and of our Independence the 102nd.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Memorandum.

The above-named defendant is notified that unless he shall enter his appearance in the clerk's office of said court at Chicago aforesaid on or before the day to which the above writ is returnable, the complainant's bill will be taken against him as confessed and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

I have served the within writ within my district in the following manner, to wit: Upon Mark Kimball, as collector of the town of South Chicago, therein named, on the 18th day of February, A. D. 1878, by personally delivering to him a true copy of the same on the aforesaid day.

J. S. HILDRUP,
U. S. Marshal,
By D. D. SABIN, *Deputy.*

(Endorsed:) Filed Feb. 22, A. D. 1878. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 14th day of March, A. D. 1878, in
34 the adjourned March term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE GERMAN NATIONAL BANK OF CHICAGO
vs.
MARK KIMBALL, COLLECTOR, &C. } In chancery.

On motion of complainant's solicitors leave is given complainant to file a supplemental bill making Samuel H. McCrea, as treasurer, &c., a party defendant herein.

Afterwards, to wit, on the 18th day of March, A. D. 1878, said complainant, by its solicitors, filed in said clerk's office its supplemental bill

of complaint in said entitled cause, which said supplemental bill is in the words and figures following, to wit:

Supplemental bill of complaint.

In the circuit court of the United States for the northern district of Illinois.

GERMAN NATIONAL BANK OF CHICAGO
vs.
MARK KIMBALL, AS COLLECTOR OF THE TOWN of South Chicago. } In chancery.

To the judges of the circuit court for the northern district of Illinois:

The German National Bank of Chicago, the complainant in this
35 suit, by leave of the court first had and obtained, makes and files this its supplemental bill herein, and alleges as follows:

That since the filing of the original bill of complaint herein the time has elapsed within which the defendant herein, Mark Kimball, as collector of the town of South Chicago, is authorized by law to collect the personal property taxes of said town or to make distraint for the same; and that the said collector has or is about to make return to Samuel H. McCrea, who is the county treasurer and ex-officio county collector of the county of Cook, of all the unpaid and uncollected taxes upon the personal property of said town, including the pretended taxes levied upon and against the shares of stock in said bank mentioned and set forth in said original bill.

That by the revenue law of the State of Illinois it is made the duty of the county treasurer and collector aforesaid, upon receipt of such return, to collect such unpaid personal property taxes, and he is authorized to do so by distraint; and that the said Samuel H. McCrea, as such officer, threatens to, and will, unless restrained by the order of this court, levy upon and sell the shares of stock of the said bank and its stockholders to pay the pretended taxes levied upon the same.

36 Your orator therefore prays that for the reasons hereinbefore as well as in the original bill set forth the said Samuel H. McCrea, who is a citizen of the said State of Illinois and a resident of said district, be made a party defendant to the said bill and to this suit; and that the said Samuel H. McCrea, as county treasurer of the county of Cook and ex-officio county collector, his successor or successors in office, and his and their agents, deputies, and servants, be perpetually enjoined and restrained by the injunctional order of this court from collecting or attempting to collect the said taxes or any portion thereof, and for such further or other relief as may be agreeable to equity.

And that in the mean time, and until the further order of the court, he and his successors, deputies, agents, and servants be temporarily enjoined and restrained from collecting or attempting to collect said taxes or any part thereof.

To the end, therefore, that the said defendant, Samuel H. McCrea, as county collector, &c., may, if he can, show cause why your orator should not have the relief herein and in said original bill prayed for, and may make full, true, and perfect answer to the matters herein and in said original bill alleged, but not under oath, answer under oath being waived, may it please your honors to grant unto your orator the writ of
37 injunction issuing out of and under the seal of this court according to the statute in such case made and provided, directed to the

said Samuel H. McCrea, as county treasurer and ex-officio collector of the county of Cook, enjoining and restraining him, his successor or successors in office, and his and their deputies, agents, and servants, from collecting or attempting to collect the taxes or any of them levied upon or against the shares of stock of your orator and its stockholders for the year 1877, until the further order of the court in the premises.

And may it please your honors to grant unto your orator a writ of subpœna of the United States of America, issuing out of and under the seal of this honorable court, directed to the said Samuel H. McCrea, as county treasurer and collector ex-officio of the county of Cook, defendant, commanding him on a day certain therein to be named, and under a certain penalty, to be and appear in this honorable court, then and there to answer all and singular the premises, and to stand to, abide, and perform such further order, direction, and decree as may be made against him.

ALBERT M. DAY.

TENNEYS, FLOWER AND ABERCROMBIE,
Solicitors and of Counsel for Complainant.

38 NORTHERN DISTRICT OF ILLINOIS, *ss:*

Albert M. Day, being duly sworn, deposes and says that he is the vice-president and managing officer of the German National Bank, the complainant in the above suit, and makes this affidavit in its behalf; that he has read the foregoing bill and knows the contents thereof, and that the same is true, of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

ALBERT M. DAY.

Subscribed and sworn to before me this 18th day of March, A. D. 1878.

[SEAL.] JESSE HOLDOUR,
Notary Public.

(Endorsed:) Filed M'ch 18, 1878. Wm. H. Bradley, clerk.

On the same day, to wit, the 18th day of March, A. D. 1878, a writ of subpœna issued out of said clerk's office, in said entitled cause, which said writ, together with the returns of the marshal endorsed thereon, is in the words and figures following, to wit:

Writ of subpœna.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to Samuel H. McCrea, impleaded
39 with Mark Kimball, collector, &c., greeting:

We command you that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of May next, to answer the bill of complaint and amendment thereto of German National Bank of Chicago, heretofore filed in the clerk's office of said court in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 18th day of March, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the 102nd.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Memorandum.

The above-named defendant is notified that unless he shall enter his appearance in the clerk's office of said court at Chicago aforesaid
40 on or before the day to which the above writ is returnable, the complainant's bill will be taken against him as confessed and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

I have served the within writ within my district in the following manner, to wit, upon Samuel H. McUrea, therein named, on the 18th day of March, A. D. 1878, by personally delivering to him a true copy of the same on the aforesaid day.

J. S. HILDRUP,
U. S. Marshal,
By J. STILLWELL,
Deputy.

(Endorsed:) Filed March 18th, A. D. 1878. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 3rd day of April, A. D. 1878, said defendant, by its solicitor, filed in said clerk's office its demurrer to the bill of complaint in said entitled cause, which said demurrer is in the words and figures following, to wit:

Demurrer to bill of complaint.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for said district.

MARK KIMBALL, COLLECTOR OF SOUTH Chicago, et al.,		
41 *ads.*	}	In chancery.
THE GERMAN NATIONAL BANK OF Chicago.		

These defendants, by protestation not confessing or acknowledging all or any of the matters and things in said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show that the said complainant hath not in and by its said bill made or stated such a case as doth or ought to entitle it to any such discovery or relief as is thereby sought and prayed for from or against these defendants; wherefore these defendants demand the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

M. R. M. WALLACE,
Solicitor for said Defendant.

I, the undersigned, M. R. M. Wallace, do hereby certify that I am of counsel for the defendants in the above-entitled cause, and that in my opinion the foregoing demurrer to the complainant's bill of complaint filed therein is well founded in point of law.

M. R. M. WALLACE,
Of Counsel for said Defendant.

42 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The undersigned, S. H. McCrea, being first duly sworn, on oath says that he is one of the defendants in the above-entitled cause and that the foregoing demurrer filed therein is not interposed for delay.

S. H. McCREA.

Subscribed and sworn to before me this second day of April, A. D. 1878.

[SEAL.] JOSEPH B. LEAK,
Notary Public.

(Endorsed:) Filed April 3, 1878. Wm. H. Bradley, cl'k.

And afterwards, to wit, on the 18th day of May, A. D. 1878, in the adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE GERMAN NATIONAL BANK OF CHICAGO
vs.
MARK KIMBALL, AS COLLECTOR OF THE TOWN of South Chicago, and Samuel H McCrea, treasurer, &c. } In chancery.

Now come the parties by their solicitors, and now comes on to
43 be heard the demurrer of the defendant to the complainant's bill of complaint herein, and the court, after hearing the same, together with the arguments of counsel, sustains said demurrer and dismisses the bill of bomplaint herein for want of equity.

It is thereupon considered, adjudged, and decreed by the court that this cause be dismissed, and that the defendant do have and recover of and from the complainant herein his costs and charges by him about his defence in this behalf expended, amounting to the sum of eight dollars and sixty cents, and that execution issue therefor.

And thereupon the complainant by its solicitor prays an appeal to the Supreme Court of the United States, which is allowed upon giving bond herein in the penal sum of three thousand dollars, with security, to be approved by the court.

And afterwards, to wit, on the 24th day of June, A. D. 1878, said complainant, by its solicitors, filed in said clerk's office its appeal bond in said entitled cause, which said bond is in the words and figures following, to wit:

Appeal bond.

Know all men by these presents that we, The German National Bank

of Chicago, as principal, and Daniel K. Tenney and James M. Flower, as surety, all of the City of Chicago, Cook County, State of
44 Illinois, are held and firmly bound unto Mark Kimball and Samuel H. McCrea, also of the city, county, and State aforesaid, in the penal sum of three thousand dollars, lawful money of the United States, for the payment of which, to be made, well and truly, we bind ourselves, our heirs, executors, administrators, and successors, jointly, severally, and firmly by these presents. Witness our hands and seals this twenty-fourth day of June, A. D. 1878.

The condition of the above obligation is such, that whereas in a certain cause then pending in the circuit court of the United States in and for the northern district of Illinois, in chancery, wherein the German National Bank of Chicago was complainant, and the said Mark Kimball, as collector of the town of South Chicago, and said Samuel H. McCrea, as treasurer of Cook County, in the district aforesaid, were defendants, there was made and entered of record in said cause, on the 18th day of May, 1878, an order of said court sustaining the demurrer of said defendants to the bill of complaint of said complainant, and dismissing the said bill of complaint of said complainant for want of equity, and rendering judgment against the said complainant for the costs of said suit, from which said judgment of the said circuit court the said com-
45 plainant, The German National Bank of Chicago, prayed for and obtained an appeal to the Supreme Court of the United States:

Now, therefore, if the said German National Bank of Chicago shall duly prosecute its said appeal with effect, and moreover pay the amount of the judgment, costs, and damages rendered and to be rendered against it in case the said judgment and order shall be affirmed in said Supreme Court, then the above obligation to be void; otherwise to remain in full force and virtue.

[SEAL.] GERMAN NATIONAL BANK.
By HENRY GREENEBAUM, *Pres't.* [SEAL.]
D. K. TENNEY. [SEAL.]
J. M. FLOWER. [SEAL.]

Taken and approved by me this 24th day of June, 1878.
H. W. BLODGETT, *Judge.*

(Endorsed:) Filed June 24, 1878. Wm. H. Bradley, cl'k.

46 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein the German National Bank of Chicago is the complainant, and Mark Kimball, as collector of the town of South Chicago, et al. are defendants, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed my seal at my office in Chicago, in said district, this 25th day of September, A. D. 1878, and of our Independence the one hundred and third year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsement on cover:) No. 507. The German National Bank of Chicago, appellant, vs. Mark Kimball, collector of the town of South Chicago, and Samuel H. McCrea, treasurer, &c. N. Illinois. C. C. U. S. Filed 5th October, 1878.